87-409

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

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JOHN J. BUDINSKY, individually and t/d/b/a COLPAT MINE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NICHOLAS DeBENEDICTUS, HUGH V. ARCHER, and TONY SMERDEL,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTION PRESENTED FOR REVIEW

1. Whether 30 U.S.C. sec. 1255(b) permits a state regulatory authority, under authority of primacy granted by the Secretary of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), to regulate less than two acre mining operations, which less than two acre operations are specifically exempted by 30 U.S.C. sec. 1278(2) from the provisions of the SMCRA, and which state regulation is thereby preempted by federal law.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	2
Jurisdiction	2
Statutory and Constitutional Provisions Involved	3
Statement of the Case	5
Reason for Granting Writ	9
I. 30 U.S.C. sec. 1255(b) does not permit a state regulatory authority, under authority of primacy granted by the Secretary of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), to regulate less than two acre mining operations, because less than two acre operations are specifically exempted by 30 U.S.C. sec. 1278(2) from the provisions of the SMCRA, and state regulation is thereby preempted by federal law	9
Conclusion	14

TABLE OF CITATIONS

Page

Cases

Commonwealth of Virginia ex. rel. Virginia Department of Conservation v. Watt, 741 F.2d 37 (4th Cir. 1984) 11

Statutes and Regulations

28 U.S.C. 1331 (30 U.S.C.A. sec. 1331) 8

28 U.S.C. 1343 (30 U.S.C.A. sec. 1343) 8

30 U.S.C. 1255(b) (30 U.S.C.A. sec. 1255(b)) 3, 7, 8, 9

30 US.C. 1270 (30 U.S.C.A. sec. 1270) 8

30 U.S.C. 1278(2) (30 U.S.C.A. sec. 1278(2)) 4, 6, 9

42 U.S.C. 1983 (42 U.S.C.A. sec. 1983) 3, 7

35 P.S. 691.315(a) (Purdon Supp. 1986) 3, 4

25 Pa. Code 86.11 ..... 4, 9

25 Pa. Code 86.14 ..... 5, 9

Legislative Materials

S. Rep. No. 28, 95th Cong., 1st Sess. 98 (1977), reprinted in 1977 CIS 313-6 10

H.R. Rep. No. 100-59, 100th Cong., 1st Sess. (1987) 10, 12

APPENDIX

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit dated May 27, 1987 ..... 1A

Appendix B—Memorandum and Order of the United States District Court for the Western District of Pennsylvania dated October 22, 1986 ..... 13A

Appendix C—Judgment of the United States Court of Appeals for the Third Circuit dated May 27, 1987 ..... 22A

Appendix D—Opinion and Order Sur Motion for Summary Judgment of Commonwealth of Pennsylvania, Environmental Hearing Board, dated February 22, 1985 ..... 24A

Appendix E—Compliance Order from Commonwealth of Pennsylvania, Department of Environmental Resources, dated June 24, 1984 ..... 30A

Appendix F—Order Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit dated June 23, 1987 ..... 34A

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NICHOLAS DeBENEDICTUS, HUGH V. ARCHER, and TONY SMERDEL,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

John J. Budinsky, individually and t/d/b/a Colpat Mine, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the

United States Court of Appeals for the Third Circuit entered in the above entitled case on May 27, 1987.

———o———

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Third Circuit affirming the District Court Order, dated and entered May 27, 1987, is printed in the Appendix hereinafter at 1A. It is officially reported at 819 F.2d 418 (3rd Cir. 1987).

2. The Opinion and Order of the United States District Court for the Western District of Pennsylvania, granting Respondent's Motion for Summary Judgment in connection with Petitioner's preemption claim and declaratory judgment request, is printed in the Appendix hereinafter at 13A. It is an unreported memorandum decision.

———o———

JURISDICTION

1. The Judgment of the United States Court of Appeals for the Third Circuit was made, entered, and filed on May 27, 1987.

2. The Order on Petition for Rehearing, which denied rehearing, is dated June 23, 1987.

3. The time for filing this Petition does not expire until September 21, 1987.

4. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. sec. 1983—Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As Amended Pub. L. 96-170, sec. 1, Dec. 29, 1979, 93 Stat. 1284.

30 U.S.C. sec. 1255—State Laws

(a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

(b) Any provision of any State law or regulation in effect upon the date of enactment of this Act, or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act. The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act. Any provision of any State law or regulation in effect on the date of enactment of this Act, or which may

become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act. Pub. L. 95-87, sec. 505(b), Aug. 3, 1977, 91 Stat. 473.

30 U.S.C. sec. 1278(2)—Surface Mining Operations Not Subject to This Act

The provisions of this Act shall not apply to any of the following activities: . . .

(2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less; and . . . Pub. L. 95-87, sec. 528 (2), Aug. 3, 1977, 91 Stat. 473.

35 P.S. sec. 691.315(a)—Operation of mines

No person or municipality shall operate a mine or allow a discharge into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person has first obtained a permit from the department. . . . As amended P.L. 894, No. 157, sec. 1, Oct. 10, 1980.

25 Pa. Code sec. 86.11—General requirements for permits.

(a) No person shall operate a mine or allow a discharge into the waters of the Commonwealth unless such person has first obtained a permit from the Department.

(b) Permits shall be issued only to an operator.

(c) Except as provided for in sec. 86.12 and Subchapter E, on and after 8 months from the effective date of this chapter, no person shall engage in or carry out coal mining activities within Pennsylvania, unless that person has first obtained a valid permit issued by the Department. As amended 12 Pa. Admin. Bull. 2477, July 31, 1982.

25 Pa. Code sec. 86.4(a)—Permit application filing deadline.

(a) Each person who possesses a permit for coal mining activities issued by the Department prior to effective date of this chapter and who expects to conduct the permitted activities after the expiration of 8 months from the effective date of this chapter shall reapply for a permit for those activities within 2 months of the effective date of this chapter. As amended 12 Pa. Admin. Bull. 2477, July 31, 1982.

———o———

STATEMENT OF THE CASE

Petitioner John J. Budinsky is an individual who is a resident of and owns land and rights to bituminous coal reserves in the Western District of Pennsylvania. On November 28, 1977, he was issued a Mine Drainage Permit by Respondents pursuant to Section 315(a) of the Clean Streams Law, authorizing the operation of a mine known as the Colpat Mine, and allowing the mining of forty thousand tons of coal per year. Thereafter, Budinsky began extensive workings which disturbed a total of less than two acres of surface area. Budinsky expended large sums of money over seven years to develop the Colpat Mine, to the exclusion of other means of earning a livelihood and

in reliance on the permit, and placed valuable equipment there. Budinsky intended to sell his coal to households, and believes he would have had willing buyers for it at thirty five dollars ($35.00) per ton.

Respondent Department of Environmental Resources is a state agency which is responsible for the overall administration and enforcement of Pennsylvania's programs which regulate bituminous underground coal mining, and the individual Respondents are responsible for same on a day to day basis, including issuance, administration, and enforcement of the permitting requirements of those programs.

In 1977, the Congress of the United States passed the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), establishing minimum nationwide standards for each state to follow in implementing regulations for the conduct of surface and underground coal mining. Section 528(2) of the act (30 U.S.C. 1278(2)) exempted less than two acre commercial operations from the act's coverage. The Pennsylavnia General Assembly, on October 10, 1980, and Respondents, on July 31, 1982, amended the Pennsylvania statutes and codes to reflect the minimum standards of the SMCRA, and the Department of Interior approved the amendments, allowing Respondents to assume primary jurisdiction over the enforcement of coal mining regulation in the Commonwealth of Pennsylvania. The approved Pennsylvania program did not mention the two acre exemption, and required all persons, large or small, who were already mining coal to reapply for permits in the same way.

On March 31, 1983, Respondents notified Budinsky that his permit would authorize interim operations of the

Colpat Mine until April 24, 1984, and that by that date he must submit a complete repermitting application. On January 23, 1984, Budinsky informed Respondents of his exemption, and did not reapply by the required date. Budinsky estimates the cost of reapplying for permits to be more than twenty-five thousand dollars ($25,000.00), which is not economically feasable in an operation as small as his.

On or about July 24, 1984, Respondents ordered Budinsky to immediately cease operations at the Colpat Mine until repermitted. Budinsky, pro se, appealed this Compliance Order to the Environmental Hearing Board of the Commonwealth of Pennsylvania, arguing the two acre exemption. This argument was rejected by the Environmental Hearing Board on the basis that Section 505(b) of SMCRA (30 U.S.C. 1255(b)) permits more stringent regulation of Budinsky than SMCRA, and overrides the two acre exemption.

Petitioner then began this action by Complaint seeking a declaratory judgment and injunction. Budinsky asserted that certain provisions of Pennsylvania statutes and codes regulating coal mining, as applied to him by Respondents, deprive him of rights guaranteed by the Constitution and laws of the United States; more specifically, the federal statutory exemption from such regulation for less than two acre mines. Budinsky argued that state regulation, as applied to him, was preempted by Congress when it passed SMCRA. Budinsky filed an Amended Complaint adding Counts for money damages incurred as a result of the acts of Respondents, on alternative theories of deprivation of rights secured by the Constitution and laws of the United States and/or taking of property rights without compensation under 42 U.S.C. 1983. Jurisdiction was

asserted under 28 U.S.C. secs. 1331 and 1343, and 30 U.S.C. 1270.

Respondents moved to dismiss the Complaint and Amended Complaint on several bases, including failure to state a claim upon which relief could be granted under SMCRA, because of certain statutory authority permitting states to establish more stringent standards than the federal statute, and the approval of Pennsylvania's program by the Secretary of the Interior.

The District Court by Memorandum Opinion and Order dismissed Budinsky's Complaint and Amended Complaint. In its Memorandum, the District Court accepted Respondents' argument that 30 U.S.C. sec. 1255(b) provides specific statutory authority permitting states to establish more stringent standards than the federal statute, and that approval of Pennsylvania's program by the Secretary of the Interior lends legitimacy to Pennsylvania's failure to incorporate the two acre exemption in its program.

Budinsky filed a timely appeal to the Third Circuit Court of Appeals questioning this dismissal and the District Court's failure to grant leave to file a Second Amended Complaint adding the Secretary of the Interior as Defendant, because the Secretary had failed to require the two acre exemption as part of the Pennsylvania program.

The Third Circuit upheld the District Court, interpreting the statutes involved in the same way as the District Court, and further holding that there was no way in which Budinsky could amend his Amended Complaint to state a cause upon which relief could be granted. Hence this Petition.

REASONS FOR GRANTING THE WRIT

I.

30 U.S.C. sec. 1255(b) does not permit a state regulatory authority, under authority of primacy granted by the Secretary of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), to regulate less than two acre mining operations, because less than two acre operations are specifically exempted by 30 U.S.C. sec. 1278(2) from the provisions of the SMCRA, and state regulation is thereby preempted by federal law.

The case at bar involves a Third Circuit decision concerning SMCRA which holds that state regulatory agencies are permitted to regulate mining operations which Congress specifically exempted from such regulation, a decision which is clearly contrary to Congress' express intention. Petitioners seek certiorari to address this Third Circuit decision because it is directly opposite the reasons for the exemption set forth in Congressional reports on the subject, and as such constitutes an important question of federal law which has not been, but should be, settled by this court.

In general, the disputed Pennsylvania statutes and regulations provide in relevant part that "no person" can operate a mine unless authorized by Respondents, or obtain a permit from Respondents, and do not distinguish less than two acre operations, as SMCRA requires. (See generally and compare, 35 Pa.C.S.A. 691.135(a)(Purdon Supp. 1986), 25 Pa. Code 86.11, and 25 Pa. Code 86.14 (1985). The Third Circuit's finding that SMCRA does not preempt,

and that the federal provisions simply do not affect, the regulation of less than two acre mines, is erroneous because it is directly opposite the intent of Congress on the point.

The legislative history of the two acre exemption supports Petitioner. The two acre exemption was made part of SMCRA because "The Committee felt that these three classes of surface mining cause very little environmental damage and that regulation of them would place a heavy burden on both the miner and the regulatory authority." S. Rep. No. 28, 95th Cong., 1st Sess. 98 (1977), reprinted in 1977 CIS 313-6. This was recently amplified in H.R. Rep. No. 100-59, 100th Cong., 1st Sess. (1987). Where the Congress of the United States clearly restated its intention that SMCRA both preempt and affect the regulation of less than two acre mines: "In 1977, Congress chose to preempt the entire field, but allowed the extraction of coal which affected two acres or less to be exempt. Pursuant to that exemption in SMCRA, states were free to adopt or continue regulatory schemes *for* (emphasis added) these smaller sites." H.R. Rep. 100-59, *supra*, at 5. This language indicates that Congress preempted the entire field, and then returned regulatory authority to the states, with the Respondents being required to either continue regulating Petitioner as they had been, or to adopt regulations specifically *for* Petitioner's less than two acre site.

Further, Respondents were not free to apply more stringent land use and environmental controls to Respondent by authority of 30 U.S.C. sec. 1255(b), as the Third Circuit found, because Congress says Respondents retained no latent, unpreempted police power to do so after SMCRA

preempted the entire field.[1] Respondents could not apply the more stringent land use and environmental controls to Petitioner through 30 U.S.C. 1255(b), after receiving primacy over the field under SMCRA, because H.R. 100-59 clearly states that:

> Section 528(2), which is repealed by this Act, exempted surface coal mining operations which extract coal for commercial purposes from all of the provisions of SMCRA where such operations affect two acres or less. Therefore, operators of surface coal mining operations on these two acre or less sites are not required to comply with the *permitting, land reclamation, or environmental performance requirements* (emphasis added) required of larger operations under SMCRA.
>
> As perceived in 1977, the two acre exemption was designed to relieve small operators from the cumbersome and time-consuming burden of permitting and full compliance with all provisions of SMCRA. It was an accommodation for, and recognition of, small "mom and pop" operators who had neither the time, the means nor the technical know-how to fulfill all the procedural requirements of SMCRA. It was

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[1]In this regard, the Third Circuit misapprehended the point which Budinsky sought to make by citing *Virginia ex. rel. Virginia Department of Conservation and Economic Development v. Watt*, 741 F.2d 37 (4th Cir.), cert. granted, 469 U.S. 979, and cert. dismissed, 469 U.S. 1198 (1985), because Budinsky did not cite *Watt* for the notion that if one state has the two acre exemption then another should, but rather to illustrate that there was no latent, unpreempted police power left to the states after SMCRA. The language in that case at 741 F.2d at 38, and cited in footnote 1 of the Third Circuit's Opinion, is only a brief chronology of events indicating that Virginia did not adopt its plan for regulating less than two acre mines until after its entire program had received approval from the Department of the Interior.

> believed that the operations would be small both in size and number and that consequently the adverse impact would be minimal upon individuals in the surrounding areas, as well as upon the environment.

H.R. Rep. 100-59, *supra*, at 3. Therefore, the "more stringent land use and environmental controls and regulations" mentioned in 30 U.S.C. 1255(b) were specifically intended by Congress not to apply to less than two acre operations, even if the Third Circuit is correct in finding that they were not intended to apply only to 30 U.S.C. secs. 1256 and 1257.

The Third Circuit concluded that 30 U.S.C. 1255(b) applies to all of SMCRA because that section states that it applies to the entire chapter. Petitioner submits that the Third Circuit could just have easily have found that Respondents could not apply the more stringent land use and environmental controls to Petitioner, because 30 U.S.C. 1278(2) clearly states that "the provisions of this *chapter*" (emphasis added) shall not apply to Petitioner's mine, and since the SMCRA occupies all of Chapter 25 of Title 30, Section 1278(2) pertains to the entire act, including the authorization of more stringent land use and environmental controls contained in 30 U.S.C. sec. 1255(b). At best, SMCRA is facially inconsistent, and this inconsistency creates a void in which Congressional intent must be discerned from available legislative materials, which are supportive of Petitioner. These legislative materials were not addressed or distinguished by the Third Circuit; and the underlying inconsistency in the laws of the United States is the essence of important statutory construction, which is the work of this Honorable Court.

The public policy implications are even more important. Respondents, by regulating Petitioner, are derogating their duty to supervise larger and far more damaging operations. The congressional intent that SMCRA be vigorously enforced as to large operations is in danger, and review by this Court is now needed to further that goal. Respondents must be required to leave Petitioner alone, and direct their efforts in the directions that Congress thought would be most efficient and productive. SMCRA did not authorize states to be more stringent by regulating something that they were not to regulate in the first place. State laws providing for more stringent land use and environmental controls are secondary to compliance with the broader purpose of the act, and to this end state agencies are to implement the federal act, without discretion to apply performance standards to less than two acre operations.

Finally, the effect on small operations is too important to be ignored. The Pennsylvania regulations make it too expensive for these operators to get new permits, and leave those such as Petitioner who relied on and invested in their permits out in the cold. Those regulations produce the absurd and unintended result of placing "Mom and Pop" operations wishing to obtain permits in the same category as U.S. Steel or Consolidated Coal.

———o———

CONCLUSION

In view of the foregoing considerations, the Petitioner respectfully submits that this Petition should be granted.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 27, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3665

JOHN J. BUDINSKY, Individually
and t/d/b/a COLPAT MINE,

Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, NICHOLAS DeBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources, HUGH V. ARCHER, Individually and in his capacity as Regional Water Quality Manager of the Bureau of Water Quality Management of the Commonwealth of Pennsylvania Department of Environmental Resources, TONY SMERDEL, Individually and in his capacity as Chief, Permits Division Bureau of Water Quality Management of the Commonwealth of Penna. Dept. of Environmental Resources

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Appeal from the United States
District Court for the Western
District of Pennsylvania (Pittsburgh)

(D.C. Civil No. 86-00203)

Submitted Under Third Circuit Rule 12(6)
May 12, 1987

Before: GIBBONS, *Chief Judge*,
MANSMANN, *Circuit Judge*, and
KATZ, *District Judge*.*

(Filed May 27, 1987)

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---

* Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This matter comes before us on appeal from an order of the district court, which granted motions by the defendants—the Pennsylvania Department of Environmental Resources, et al. ("the DER")—to dismiss the complaint and amended complaint of the plaintiff, John J. Budinsky. We possess jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Budinsky claims that the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201-1328, preempts certain sections of Pennsylvania's Clean Streams Law, 35 Pa. Cons. Stat. Ann. § 691.1-691.1001 (Purdon 1977 & Supp. 1986), sections of the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 Pa. Cons. Stat. Ann. § 1396.1-1396.31 (Purdon Supp. 1986), and sections of the regulations at 25 Pa. Code § 86.1-86.242 (1985). Because the SMCRA exempts from its provisions "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278(2), Budinsky contends that the DER cannot require him to obtain a state permit for his less-than-two-acre mine.

However, the SMCRA also states that "[a]ny provision of any State law or regulation . . . which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this chapter or any regulation issued pursuant thereto shall not be construed to be inconsistent with this chapter." 30 U.S.C. § 1255(b). Because the district court properly concluded in light of

§ 1255(b) that "the federal statute does not supersede the Pennsylvania state laws and regulations and [that] defendants have not violated federal law by enforcing the provisions of the Pennsylvania laws against Budinsky[,]" *Budinsky v. Pennsylvania Dept. of Environmental Resources,* No. 86-203, slip op. at 6 (W.D. Pa. Oct. 22, 1986) (hereinafter "slip op."), we will affirm the district court's judgment.

I.

Budinsky owns a small bituminous coal mine in Perry Township, Green County, Pennsylvania known as the Colpat mine. On November 28, 1977, the DER issued Budinsky a mine drainage permit which allowed him to mine 40,000 tons of coal per year. According to the plaintiff, he thereupon constructed water treatment systems, haul roads, and electrical systems to exploit the Colpat mine's reserves for commercial purposes. Over the next seven years, Budinsky spent $40,000 and exerted substantial personal effort to develop and maintain his mine. The combined surface and underground mining activities disturbed less than two acres of surface area.

Meanwhile, Congress in 1977 enacted the SMCRA which proposed, *inter alia,* to establish national minimum standards "to protect society and the environment from the adverse effects of surface coal mining operations[.]" 30 U.S.C. § 1202(a). Under the SMCRA, the several states may "assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations . . .," 30 U.S.C. § 1253(a), by developing and submitting for the approval of the Secretary of the Interior "a program which

demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes . . . ." *Id.* Title 30 U.S.C. § 1255(a) states accordingly that "[n]o State law or regulation . . . shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter."

Notably, the SMCRA provides:

> The provisions of this chapter shall not apply to any of the following activities:
> . . .
>
> > (2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less[.]

30 U.S.C. § 1278(2). However, the SMCRA also states:

> Any provision of any State law or regulation . . . which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this chapter or any regulation issued pursuant thereto shall not be construed to be inconsistent with this chapter. The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this chapter. Any provision of any State law or regulation . . . which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this chapter shall not be construed to be inconsistent with this chapter.

30 U.S.C. § 1255(b).

On October 10, 1980, Pennsylvania's General Assembly and the DER, respectively, amended their statutes and regulations in light of the SMCRA, and the federal Department of the Interior approved the state's program.

Those amendments require mine operators to obtain permits for all mining activity, and contain no exemption for small mines. *See* 35 Pa. Cons. Stat. Ann. § 691.315(a) (Purdon Supp. 1986); 52 Pa. Cons. Stat. Ann. § 1396.4; (Purdon Supp. 1986); 25 Pa. Code § 86.11 (1985). On March 31, 1983, the DER informed Budinsky that his current mine drainage permit would allow continued activity at the Colpat mine until April 24, 1984; thereafter, he would have to complete a repermitting application. Budinsky, however, instead notified the DER that 30 U.S.C. § 1278(2) exempted the Colpat mine from the state's requirements.

In July of 1984, the DER ordered Budinsky to cease operations until he submitted a re-permitting application. Budinsky appealed the compliance order to the Pennsylvania Environmental Hearing Board which denied his claim. Budinsky then filed this action in the district court on January 27, 1986 seeking declaratory and injunctive relief. The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted alleging, *inter alia*, that "there is specific federal statutory authority permitting states to establish more stringent standards than those established by federal statute."

Before the district court determined the defendants' Rule 12(b)(6) motion, the plaintiff filed an amended complaint which added claims for compensatory and punitive damages and proffered the alternative theory that the defendants' actions violated the Fifth and Fourteenth Amendments. The defendants renewed their motion to dismiss with respect to the amended complaint.

On October 22, 1986, the district court issued a memorandum opinion and order dismissing both the complaint

and the amended complaint on the ground that "the [SMCRA] specifically permit[s] a state to adopt more stringent environmental controls than those embodied in the federal Act." Slip op. at 8. This timely appeal followed that final order.

II.

The plaintiff presses two basic issues on appeal. First, Budinsky insists that 30 U.S.C. § 1255 applies solely to the "procedural, technical, and substantive permit application requirements" in 30 U.S.C. §§ 1256 and 1257. Thus, § 1255 does not, according to Budinsky, allow the DER to regulate mining operations affecting less than two acres. In a related argument, the plaintiff contends that 30 U.S.C. § 1278(2) shelters less-than-two-acre mines altogether from federal and state regulation under the SMCRA. Second Budinsky complains that the district court abused its discretion in refusing to grant him leave to amend his complaint further to "add the Secretary of the Interior as a Defendant as a result of his failure to require the Two Acre Exemption as part of Pennsylvania's primacy program."

Because this appeal derives from a motion to dismiss, "the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). We must also liberally construe the complaint in the plaintiff's favor. *Id., citing* Fed. R. Civ. P. 8(f) and *Conley v. Gibson*, 355 U.S. 41 (1957). Finally, of course, we follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief [footnote omitted]." *Conley*, 355 U.S. at 45-46.

We may reverse a district court's refusal to permit Budinsky to amend his complaint if the court abused its discretion with respect to the liberal standard of Fed. R. Civ. P. 15(a). *Adams v. Gould Inc.*, 739 F.2d 858, 863 (3d Cir. 1984), *cert denied*, 469 U.S. 1122 (1985). Although in *Adams* we acknowledged the liberal amendment philosophy of Rule 15, we emphasized that a district court may "refuse to allow an amendment that fails to state a cause of action." *Id.* at 864, *citing Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

III.

A.

Initially, nothing in the plain language of the SMCRA suggests that the Act preempts the regulation of less-than-two-acre mines. The federal provisions simply do not affect "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278(2). Moreover, Congress never intended 30 U.S.C. § 1255(b) to apply, as Budinsky argues, only to §§ 1256 and 1257. Section 1255 clearly states that no state law or regulation more stringent than "the provisions of this *chapter* or any regulation issued pursuant thereto . . . ," 30 U.S.C. § 1255(b) (emphasis added), "shall be superseded by any provision of this chapter or any regulation issued pursuant thereto . . . ." 30 U.S.C. § 1255(a). The SMCRA occupies all of Chap-

ter 25 of Title 30. Section 1255, then, manifestly pertains to the entire Act, including the two-acre exemption of § 1278(2).

Concededly, as Budinsky contends, 30 C.F.R. § 718.1 applies the "more stringent" language of 30 U.S.C. § 1255 to "performance standards" promulgated pursuant to the SMCRA. Title 30 C.F.R. § 718.1(a) (1986) states:

> Any State law or regulation which is determined by the Secretary under the procedures in this section to be more stringent performance standard for regulation of surface coal mining and reclamation operations than that provided under a performance standard in Parts 715, 716, or 717 of this chapter shall be adopted by the Secretary and applied in that State instead of the requirements of the standards in Parts 715, 716, or 717.

That regulation, however, in no way proves Budinsky's argument "that 30 U.S.C. 1255(b) is intended to apply only to those sections of Title V of SMCRA which set forth performance standards . . . ." To the contrary, 30 C.F.R. § 700.3 states:

> The Secretary is authorized to administer the requirements of the Act, except the following: . . .
>
> > (c) Authority retained by the States to enforce State laws or regulations which are not inconsistent with the Act and this chapter, including the authority to enforce more stringent *land use and environmental controls and regulations.*

30 C.F.R. § 700.3 (1986) (emphasis added). Because Pennsylvania's blanket permit provisions represent (in terms of 30 U.S.C. § 1255(b)) "more stringent land use and environmental controls and regulations . . . " than § 1278(2),

the SMCRA does not void the state's re-permitting requirement.

The DER's view, contrary to Budinsky's, respects the express Congressional finding that:

> because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, *the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States*[.]

30 U.S.C. § 1201(f) (emphasis added). The SMCRA nowhere hints that Congress insulated less-than-two-acre mines from state regulatory schemes.

Budinsky misplaces his reliance on *Virginia ex rel. Virginia Dept. of Conservation and Economic Dev. v. Watt*, 741 F.2d 37 (4th Cir.), *cert. granted*, 469 U.S. 979, *and cert. dismissed*, 469 U.S. 1198 (1985). There, as the plaintiff recognizes, the court of appeals held that the district court lacked jurisdiction to enjoin preliminarily the Office of Surface Mining ("OSM") from issuing cessation orders against certain mine operators who enjoyed two-acre exemptions under state law which, according to OSM, were more liberal than both applicable federal regulations and Virginia's SMCRA-approved state program. Budinsky, however, "relies on [*Watt*] to demonstrate that Interior's approval of Pennsylvania primacy without the Two Acre Exemption should not be given much stock, since other

States have the Two Acre Exemption.'"[1] Budinsky's argument, though, erroneously assumes that the mere presence of some form of two-acre exemption in one federally-approved state program requires such provisions in Pennsylvania. We reiterate that nothing in the SMCRA precludes a state from exceeding the Act's land use and environmental directives with more stringent standards.

In shore, we find that the SMCRA admits of Pennsylvania's across-the-board permit requirements.

B.

In light of this holding, we find that the district court did not abuse its discretion in refusing to grant Budinsky's motion to amend his complaint further to "add the Secretary of the Interior as a defendant as a result of his failure to require the Two Acre Exemption as part of Pennsylvania's primacy program." This amendment would in no way cure the failure of the complaint to state a claim upon which relief could be granted. *See Adams*, 739 F.2d at 864; *Massarsky*, 706 F.2d at 125.

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[1] In *Watt*, the court of appeals noted:

> The Commonwealth's state regulatory program was approved on December 15, 1981, subject to its compliance with certain conditions, including two conditions related to a federal exemption for mining operations which affect less than two acres [footnote omitted]. Subsequently, in 1982, the Virginia legislature enacted Chapter 23, Va. Code 45.1-362 through 45.1-380 (1982), entitled "Surface Mining of Coal for Operations Disturbing Two Surface Acres or Less."

741 F.2d at 38.

IV.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 22, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

JOHN J. BUDINSKY, individually and t/d/b/a COLPAT Mine, Plaintiff	)	
v.	)	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES; NICHOLAS DeBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania Department of Environmental Resources; HUGH V. ARCHER, individually and in his capacity as Regional Water Quality Manager of the Bureau of Water Quality Management of the Commonwealth of Pennsylvania Department of Environmental Resources; TONY SMERDEL, individually and in his capacity as Chief, Permits Division, Bureau of Water Quality Management of the Commonwealth of Pennsylvania Department of Environmental Resources, Defendants.	)	Civil Action No. 86-203

MEMORANDUM OPINION

Defendants have filed motions to dismiss plaintiff's complaint and amended complaint. Plaintiff's complaint and amended complaint seek a declaration that the provisions of two Pennsylvania statutes, and regulations implementing those statutes, cannot be applied to the operations of a two acre coal mine because regulation of this mine is preempted by federal law. For the reasons stated herein, the complaint and amended complaint will be dismissed.

Plaintiff, John J. Budinsky, filed a complaint on January 23, 1986 naming the Commonwealth of Pennsylvania Department of Environmental Resources (DER) and three individuals, Nicholas DeBenedictis, Hugh V. Archer, and Tony Smerdel,[1] as defendants. Budinsky's complaint Budinsky's complaint sought a declaration that Pennsylvania's Clean Streams Law, 35 P.S. § 691.1 et seq., Pennsylvania's Surface Mining Conservation and Reclamation Act, 32 P.S. § 1396.1 et seq., and Pennsylvania regulations implementing these statutes did not apply to Budinsky's operation of a two acre coal mine because an exemption for two acre coal mines embodied in the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., § 1278, preempted the provisions of the Pennsylvania laws. The Pennsylvania laws required

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[1] All three were named as defendants individually and in their capacities as Pennsylvania State officials. Nicholas DeBenedictis is Secretary of the Commonwealth of Pennsylvania Department of Environmental Resources (DER). Hugh V. Archer is Regional Water Quality Manager of the Bureau of Water Quality Management of the DER. Tony Smerdel is Chief, Permits Division, Bureau of Water Quality Management of the DER.

all coal mines, including two acre coal mines, to obtain permits. Budinsky also sought an injunction enjoining the defendants from imposing the provisions of the Pennsylvania laws and regulations on his coal mine.

On February 27, 1986, the defendants moved to dismiss Budinsky's complaint. Defendants asserted that the action against the DER was barred by the Eleventh Amendment, that the complaint failed to state a civil rights claim, that the complaint failed to state a claim upon which relief could be granted, that Budinsky failed to exhaust existing state remedies, and that this Court should abstain from administering Pennsylvania environmental laws.

On July 21, 1986, Budinsky amended his complaint alleging the he was suffering irreparable pecuniary injury because of the unconstitutional and illegal actions of the defendants and that the defendants' actions in denying Budinsky a permit to operate his mine appropriated his mineral rights in his land and thereby deprived him of his property without due process of law.

Budinsky owns a small coal mine in Perry Township, Greene County, Pennsylvania known as the Colpat mine. Budinsky had operated this mine since November 28, 1977 the date on which the DER issued him a Mine Drainage Permit. Budinsky's activities at the mine consisted of surface and underground mining activities. Surface mining activities included excavation and construction of water treatment systems, haul roads, and electrical systems in order to exploit the coal seams under his property. Budinsky claimed that his surface and underground activities disturbed a total surface area of less than two acres.

In 1977, Congress passed the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., thereby establishing a nationwide program to deal with the adverse effects of surface coal mining operations. The federal Act specifically provided that a state could assume exclusive jurisdiction over the regulation of surface coal mining if the state could demonstrate that it had a program, including state laws, capable of carrying out the provisions of the federal program, and the state obtained the approval of the Secretary of the Interior. As a result, Pennsylvania, in 1980, adopted the statutes in question and the Secretary of the Department of the Interior approved Pennsylvania's program, thereby permitting the DER to assume exclusive responsibility for enforcement of coal mining activities in Pennsylvania.

On March 31, 1983, DER, acting through the individual defendants, notified Budinsky that he was required to obtain a new permit for his mine by April 24, 1984. The DER informed Budinsky that his November, 1977 permit authorized interim operations at the Colpat mine until that date. On January 23, 1984 Budinsky requested the DER to allow his November, 1977 permit to continue to be valid claiming that the Congress of the United States had given him an exemption from the permitting provisions of the Pennsylvania laws.[2] Budinsky did not apply for a new permit by April 24, 1984. On July 24, 1984,

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[2] Budinsky claimed his exemption under 30 U.S.C. § 1278 which provides in pertinent part, "The provisions of this chapter shall not apply to . . . . (2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less;"

the DER issued a compliance order to Budinsky, ordering him to cease operations at the Colpat mine until a complete repermitting application was submitted. Budinsky appealed this order pro se to the Environmental Hearing Board of the Commonwealth of Pennsylvania. The Hearing Board rejected Budinsky's appeal holding that the DER had authority to require repermitting under 30 U.S.C. § 1255(b). Budinsky then filed the complaint in this case alleging that the two acre exemption embodied in the federal Surface Mining Control and Reclamation Act preempted the application of the Pennsylvania laws to the Colpat mine.

Budinsky's complaint and amended complaint do not state a claim upon which relief may be granted. The federal Surface Mining Control and Reclamation Act specifically provides that states may assume exclusive jurisdiction over the regulation of surface coal mining,[3] 30 U.S.C. § 1253, provided certain requirements are met. Budinsky makes no claim that Pennsylvania has not met the requirements necessary to obtain the Secretary of the Interior's approval of Pennsylvania's program, and in fact, Budinsky acknowledges that the Secretary of the Department of the Interior has approved Pennsylvania's program.

The federal Surface Mining Control and Reclamation Act also explicitly provides that it supersedes no state law unless the state law is inconsistent with the federal

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[3] The statute also lists certain exceptions to the States' exclusive jurisdiction. These exceptions consist of cases where the minimum standards of the federal act are being violated or the state is not enforcing its program, 30 U.S.C. § 1271, regulation of Federal lands, 30 U.S.C. § 1273, and abandoned mine reclamations, 30 U.S.C. § 1231-1243.

Surface Mining Control and Reclamation Act. 30 U.S.C. § 1255(a). The federal Act further provides that any state law which requires more stringent land use or environmental controls shall not be construed to be inconsistent with the federal Act, 30 U.S.C. § 1255(b). Clearly, the Pennsylvania laws which require two acre mines to obtain permits are more stringent environmental controls than the federal Act. Therefore, under the provisions of 30 U.S.C. § 1255(b) the more stringent Pennsylvania laws and regulations cannot be construed to be inconsistent with the federal statute. As a result, under the provisions of 30 U.S.C. § 1255(b) the federal statute does not supersede the Pennsylvania state laws and regulations and defendants have not violated federal law by enforcing the provisions of the Pennsylvania laws against Budinsky. Therefore, Budinsky has not stated a claim upon which relief can be granted.

Budinsky attempts to avoid this result by citing *Jaward Corporation v. Watt*, 564 F.Supp. 797 (W.D. Va. 1983) for the proposition that the Secretary of the Interior's approval of the Pennsylvania laws should be ignored because the Secretary has ignored the two acre exemption and been enjoined from so doing. *Jaward* does not help Budinsky.

In *Jaward*, the Secretary of the Interior was seeking to impose federal law on a mine which was operating without a permit under Virginia law.[3] The Secretary is per-

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[3] The mine was operating without a permit because it qualified for a two acre exemption under Virginia law. The Virginia law had been approved by the Secretary in 1981. *Commonwealth of Virginia ex rel. Virginia Department of Conservation and Economic Development v. Watt*, 741 F.2d 37, 38 (4th Cir. 1984).

mitted to take this type of action under the federal Surface Mining Control and Reclamation Act, pursuant to one of the exceptions to exclusive state regulation embodied in 30 U.S.C. §§ 1255, 1271. Specifically, the Secretary may enforce the federal Act, despite an approved state plan providing for exclusive regulation by the state, any time the minimum standards in the federal Act are being violated. 30 U.S.C. § 1271. In *Jaward* therefore the Secretary attempted to enforce the provisions of the federal Act against a mine in Virginia which the Secretary perceived as violating the minimum standards of the federal Act. The Secretary's perception that the mine was violating the minimum standards of the federal Act was based on the fact that the operations of the mine did not comply with Department of the Interior regulations for a two acre exemption, despite the fact that the mine did comply with the Virginia two acre exemption. The court in *Jaward* enjoined the Secretary of the Interior's actions under these circumstances holding only that the Secretary's regulations defining two acre mines had the effect of eliminating the two acre exemption specifically provided for by Congress and adopted by Virginia. *Jaward* at 801-802.

Jaward, therefore, stands only for the proposition that the Secretary of the Interior may not promulgate regulations which are inconsistent with or negate the provisions of the federal Surface Mining Conservation and Reclamation Act. In this case, the Secretary's approval of Pennsylvania's laws and regulations, is consistent with the federal Act because the provisions of the Act specifically permit a state to adopt more stringent environmental controls than those embodied in the federal Act. 30 U.S.C. § 1255(b). Therefore, *Jaward* does not help

Budinsky.[4] For these reasons, Budinsky's complaint and amended complaint must be dismissed for failure to state a claim upon which relief may be granted. An appropriate order will be entered.

Dated: October 22, 1986.

/s/ Hubert I. Teitelbaum
United States District Judge

ORDER

AND NOW October 22, 1986 in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that defendant's motions to dismiss plaintiff's complaint and amended complaint are granted.

/s/ Hubert I. Teitelbaum
United States District Judge

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[4] Budinsky also states in his brief that the Secretary approved the Virginia program at issue in *Jaward v. Watt* subject to its compliance with two conditions related to the two acre mine exemption. Budinsky asserts that this shows all regulatory authority was taken from the states and later handed back with federal strings attached. Again this argument does not help Budinsky. The federal Act specifically provides that the Secretary must review any proposed state program and approve it prior to the state assuming exclusive responsibility for regulation of coal mines. 30 U.S.C. § 1253. The Secretary must review the state program in order to assure that it is capable of meeting the requirements of the federal Act. Therefore, the Secretary may impose conditions on the approval of the state program to bring it into compliance with the federal Act. In this case, the Pennsylvania laws were approved by the Secretary and 30 U.S.C. § 1255 makes it clear that more stringent state environmental controls comply with the federal Act.

cc: Mark Clement, Esq.
1005 Grandview Avenue
Pittsburgh, PA 15211
For Plaintiff

Leroy Zimmerman, Attorney General
Thomas F. Halloran, Senior Deputy Attorney General
Manor Building, 4th Floor
564 Forbes Avenue
Pittsburgh, PA 15219
For Defendant.

APPENDIX C—JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 27, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3665

JOHN J. BUDINSKY, Individually
and t/d/b/a/ COPLAT MINE,

Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, NICHOLAS DeBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources, HUGH V. ARCHER, Individually and in his capacity as Regional Water Quality Manager of the Bureau of Water Quality Management of the Commonwealth of Pennsylvania Department of Environmental Resources, TONY SMERDEL, Individually and in his capacity as Chief, Permits Division Bureau of Water Quality Management of the Commonwealth of Penna. Dept. of Environmental Resources

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Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh)

(D.C. Civil No. 86-00203)

Present: GIBBONS, *Chief Judge,* MANSMANN, *Circuit Judge* and KATZ, *District Judge**

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6), May 12, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 22, 1986, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/s/ **Sally J. Mrvos**
Clerk

May 27, 1987

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* Hon. Marvin Katz of the U.S. District Court for the Eastern District of PA, sitting by designation.

APPENDIX D—OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT OF COMMONWEALTH OF PENNSYLVANIA, ENVIRONMENTAL HEARING BOARD, DATED FEBRUARY 22, 1985

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 North Second Street
Third Floor
Harrisburg, Pennsylvania 17101
(717) 787-3483

JOHN J. BUDINSKY	)	
	)	
v.	)	
	)	Docket No. 84-302-G
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

Summary judgment in favor of DER is granted and the appeal is dismissed. Section 528 of the federal Surface Mining Conservation and Reclamation Act of 1977, 30 U.S.C. § 1278, does not operate to grant Appellant an exemption from Pennsylvania's permitting requirements for coal mines. Appellant cannot operate his mine without the repermitting application required by the appealed-from compliance order 25 Pa. Code § 86.12. The order does not represent an abuse of DER's discretion.

DISCUSSION

This appeal concerns a DER compliance order which directs Appellant to cease all mining activities at his underground coal mine until such time as he submits a complete repermitting application for the mine in conformity with 25 Pa. Code § 86.12.

The essential facts of this controversy are not in dispute. Appellant operates a deep mine which is known as the "Colpat Mine". Prior to the issuance of the compliance order appealed herein, Appellant operated the mine under the authority of a permit issued pursuant to section 315 of the Clean Streams Law, 35 P.S. § 691.315. DER determined that this permit expired on March 31, 1983, as a consequence of 25 Pa. Code §86.11 which provides:

> (a) No person shall operate a mine . . . unless such person has first obtained a permit from the Department.
>
> * * *
>
> (c) Except as provided for in § 86.12 (relating to continued operation under interim permits) . . . on and after eight months from the effective date of this chapter, no person shall engage in or carry out coal mining activities within Pennsylvania, unless that person has first obtained a valid permit issued by the Department.

The effective date of Chapter 86 was July 31, 1982, the date that the regulations were published in the Pennsylvania Bulletin.[1] (The regulations were promulgated in connection with the federal government's award of primary jurisdiction ("primacy") to Pennsylvania pursuant

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[1] 12 Pa. Bull 2882 (July 31, 1982).

to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*) Thus, DER determined that Appellant's pre-existing permit expired as of March 31, 1983. However, DER construed the permit to allow interim operations, pursuant to 25 Pa. Code § 86.12 until April 24, 1984. When Appellant had not submitted the required repermitting application by April 24, 1984, DER issued the cessation order appealed herein.

The parties have agreed that this appeal turns upon a single legal issue, i.e., whether DER has the authority to require Appellant to submit the repermitting application in order to continue mining. No evidentiary hearings were held. Appellant is appearing *pro se*. He and counsel for DER have submitted briefs on the aforesaid legal issue; DER has now moved for summary judgment. Although Appellant has not responded to the DER motion, we believe that his position is made clear in his previously submitted brief.

Essentially, Appellant's argument is that he is exempt from the permitting requirements of Pennsylvania law by virtue of section 528 of the federal Act, 30 U.S.C. § 1278. He argues that when the Pennsylvania legislature adopted the federal requirements in order to be granted primacy, it should have adopted section 528 as well. He states:

> Congress desired to establish uniform national performance standards for the surface mining industry. The goal is to implement (the federal) Act in its entirety, along with individual state laws to reflect local conditions.
>
> • • •

The Secretary of the Interior of the U. S. and the Commonwealth of Pennsylvania failed to comply with the Act in its entirety by diluting it through the elimination of one of its provisions, i.e., Sec. 528.

Section 528 of the federal Act provides that certain surface mining activities are exempt from the requirements of the Act; these include coal removal by a landowner for his own non-commercial use and coal removal for commercial purposes where the surface mining operation affects two acres or less. Appellant claims that his operation would fall within either of these categories and that therefore, DER should not be entitled to require him to submit an application for a permit.[2]

DER argues that section 528 cannot operate to grant Appellant an exemption inasmuch as it simply is not part of Pennsylvania law. We concur with DER's view. We cannot read into the law an exemption which does not appear on its face, and we can see no basis for holding that section 528 should be part of Pennsylvania law. Pennsylvania amended several of its statutes[3] in 1980 in order to comply with section 503 of the federal Act, 30 U.S.C. § 1253, which specifies certain minimum requirements for the regulation of mining activities. When the federal

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[2]Since we have determined that the existence of the federal exemption plays no role in Pennsylvania's regulatory scheme, we have no need to examine *the factual basis for* Appellant's contention.

[3]See, e.g., the Act of October 10, 1980, P.L. 894, No. 157 (amending the Clean Streams Law) and the Act of October 10, 1980, P.L. 835, No. 155 (amending the Surface Mining Conservation and Reclamation Act).

government granted Pennsylvania primacy, the Secretary of the Interior determined that:

> The Pennsylvania Surface Mining Laws provide . . . for the regulation of surface mining and reclamation operations . . . in Pennsylvania in accordance with the Surface Mining Control and Reclamation Act of 1977.[4]

Certainly, this statement evidences, at least *prima facie,* that the federal government was satisfied that the changes in the Pennsylvania law were satisfactory, from the perspective of the federal Act.

Appellant argues, however, that the Secretary of the Interior failed to conform with the mandate of the federal Act because the failure to require Pennsylvania to adopt the exemption of section 528 somehow "dilutes" the Act. Quite the opposite is true. The absence of his exemption from the Pennsylvania law maeks the Pennsylvania regulatory scheme more stringent than the federal. Furthermore, this greater stringency is fully condoned by Congress Section 505 of the federal Act provides that state laws which "provide for more stringent land use and environmental controls" are not to be construed as inconsistent with the federal Act. 30 U.S.C. §1255. It is elementary constitutional law that the states are free to enact laws regulating activities within their own borders so long as those laws do not conflict with an existing federal regulatory scheme. Thus, it is clear that Congress did not intend to preclude the states from enacting more rigorous environmental controls. Pennsylvania has done so; it requires a permit where the federal government

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[4]47 Fed. Reg. 33051 (July 30, 1982).

would not, i.e., even small operators are required to comply with the requirements of section 315 of the Clean Streams Law, and 25 Pa. Code, Chapter 86. We note that this opinion is completely consistent with our recent holding in *Ralph Bloom, Jr. v. DER* (EHB Docket No. 84-145-G; Adjudication dated February 21, 1985).

As a consequence of the foregoing analysis, it is clear that DER possessed ample authority for the issuance of the compliance order to Appellant. Appellant must submit a complete repermitting application pursuant to 25 Pa. Code § 86.12 prior to resuming mining operations at the Colpat mine. DER is entitled to summary judgment as a matter of law.

ORDER

WHEREFORE, this 22nd day of February, 1985, it is order that DER's Motion Summary Judgment is granted. The appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

/s/ Anthony J. Mazullo
Member

/s/ Edward Gerjuoy
Member

DATED: February 22, 1985

cc: Bureau of Litigation
Alan S. Miller, co-counsel for DER
Joseph K. Kaput, co-counsel for DER
John J. Budinsky, Appellant

APPENDIX E—COMPLIANCE ORDER FROM COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, DATED JUNE 24, 1984

ER-MR-130a: 12/83

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
P.O. Box 2063
Harrisburg, PA 17120

CERTIFIED MAIL #P 627 277 213

COMPLIANCE ORDER

OPERATOR NAME
John J. Budinsky

DOCKET NUMBER

ADDRESS
Box 64-D, R. D. #1, Vanderbilt, PA 15486

PERMIT NUMBER
WQM Permit No. 3077303

MINE NAME OR DESCRIPTION
Colpat Mine

MUNICIPALITY
Perry Township

PHONE NUMBER
412/736-2992

COUNTY
Greene

NAME AND TITLE OF PERSON SERVED
John J. Budinsky, Owner

LICENSE NUMBER

DATE OF INSPECTION May 29, 1984

TIME OF INSPECTION From 10:00 a.m. To 11:00 a.m.

DATE OF SERVICE Upon Mail Receipt

CESSATION ORDERED [X] YES [ ] NO

The Department of Environmental Resources is the agency with authority to administer and enforce the Clean

Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq., the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945 P.L. 1198, as amended, 52 P.S. § 1386.1 et seq., and Section 1917-A of the Act of April 9, 1982, P.L. 177 as amended, 71 P.S. § 510.17, and the Rules and Regulations of the Environmental Quality Board adopted thereunder.

As authorized representative of the Department has conducted an inspection of the above mine site on the above date and has determined that violations listed in attachment(s) exist. This order constitutes a separate order for each violation listed.

Pursuant to Sections 5, 315, 316, 402, and 610 of the Clean Streams Law (35 P.S. §§ 691.5, 691.315, 691.316, 691.402 and 691.610), Section 4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b and 1396.4c) and Section 1917-A of the Administrative Code (71 P.S. § 510-17), it is hereby ordered that operator shall perform the corrective actions listed in the attachment within the designated abatement time.

APPEAL NOTICE

This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 North Second St., Harrisburg, PA. 17101 (717-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. § 510-21, and the Administrative Agency Law, 2 PA C.S. Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time

period. Copies of the appeal form and the regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not in itself create any right of appeal beyond that provided by applicable statutes and decisional law.

Department Representative

Name & Title Hugh V. Archer, Ph.D., P.E.
Regional Water Quality Manager
Signature

/s/ (ILLEGIBLE) 7/24/84

Page 1 of 2 Pages

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
P.O. Box 2063
Harrisburg, PA 17120

Docket Number

ORDER (Continuation)

PARAGRAPH

DESCRIPTION OF VIOLATION: Commencing on or before April 24, 1984 and continuing until the present, Colpat Mine has been operating without a valid permit.

LOCATION OF VIOLATION: 1/10th of a mile west from the junction of LR 30020 with P-628 on LR-30020 in Perry Township, Greene County.

PROVISIONS OF REGULATION, STATUTE OR PERMIT VIOLATED: Section 315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987 as amended, 35 P.S. §§ 691.315 *et seq.* and 25 Pa Code §§ 86.11, 86.12, and 86.13 of the Rules and Regulations of the Department.

CORRECTIVE ACTION REQUIRED OR ACTIVITY TO BE CEASED: 1) Mining at Colpat Mine is to be ceased immediately; 2) Mining activity at Colpat Mine is to remain ceased until John J. Budinsky submits a complete repermitting application for the Colpat Mine by 8/20/84 pursuant to 25 Pa Code 86.12. Submission of the repermitting application must be made to the Department of Environmental Resources, Bureau of Water Quality Management, 121 South Highland Avenue, Highland Building, Pittsburgh, PA 15206-3988.

REQUIRED ABATEMENTI DATE:

Requirement No. 1—immediately
Requirement No. 2—August 20, 1984

PARAGRAPH

DESCRIPTION OF VIOLATION:

LOCATION OF VIOLATION:

PROVISIONS OF REGULATION, STATUTE OR PERMIT VIOLATED:

CORRECTIVE ACTION REQUIRED OR ACTIVITY TO BE CEASED:

REQUIRED ABATEMENT DATE:

DATE OF SERVICE:

FOR THE DEPARTMENT:
/s/ (ILLEGIBLE) 7/24/84

APPENDIX F—ORDER SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 23, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3665

JOHN J. BUDINSKY, et al.,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES, et al.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, MANSMANN, *Circuit Judge*, and KATZ, *District Judge*.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

JUN 23 1987

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* Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.